courts have difficulty in formulating a clear concept of waste, and as a result, they leave the question to the fact finder to decide as a matter of fact whether the acts complained of constitute waste in the light of all the attendant circumstances.[7] The fact finder is required to take into consideration obsolescence, change in conditions, increase or decrease in market value, injury to freehold, prejudice to remainderman and any other circumstance which might have a bearing on the decision.

In *The Crew Corporation v. Feiler*, the court adopted the view that to constitute waste it is necessary that an act be done to the property which is prejudicial to the interest of the remainderman. This is in keeping with the liberalized view, yet it has an advantage over that approach which leaves the determination to the fact finder in that it furnishes a definite standard to apply to the facts.[8] In employing this test in the *Feiler* case, the court found that the alterations which resulted in an increased tax burden on the lessor, considered together with the option to buy in the lessee prejudiced the lessor's interest in the premises because, if the lessor wanted to sell his interest, its present value would be depressed by the lessening of his rental income as a result of the increased taxes.

RICHARD H. JENSEN

Restraint of Trade—Robinson-Patman Act—Indirect Price Discrimination.—***Ludwig v. American Greetings Corporation.***[1]—An anti-trust action to recover treble damages was brought under § 4 of the Clayton Act[2] by a competitor against a greeting card manufacturer and distributor for an alleged violation of § 2 of the Clayton Act as amended by the Robinson-Patman Act.[3] The District Court (N. D. Ohio E. D.) sustained defendant's motion for judgment, and the plaintiff appealed. The Court of Appeals for the Sixth Circuit, Miller, J., reversed, holding the allegations of plaintiff's complaint sufficient in that the action of the defendant in placing former retail customers of the plaintiff on a consignment basis in order to induce such customers to transfer their business to defendant constituted a prima facie case of indirect price discrimination.[4]

The problem which seemed to cause the greatest difficulty in the District Court was whether the plaintiff, as a competitor, had standing to sue under the treble damages provision of the Clayton Act as amended by the Robinson-Patman Act. The judge decided that the remedies were available only to consumers, and not to competitors. This position was rejected

[7] See, Melms v. Pabst Co., 100 Wis. 7, 79 N.W. 738, 46 L.R.A. 478 (1899).

[8] This view has found favor in other jurisdictions also. For example, see Pynchon v. Stearns, 52 Mass. (11 Metc.) 304 (1846).

[1] 264 F.2d 286 (6th Cir. 1959).

[2] 15 U.S.C. § 15.

[3] 15 U.S.C. § 13.

[4] It should be noted that this case does not hold that selling on consignment to a competitor's customers is indirect price discrimination; it merely holds that it is a prima facie case of such discrimination.

by the Circuit Court which found that the authorities fail to limit relief to consumers, and hold to the contrary that the remedies are available to any person who shall be injured, including competitors.[5]

The more interesting and more difficult problem to resolve is whether the particular act complained of constituted price discrimination within the meaning of § 2(a) of the Clayton Act. It should be noted that the action was brought not on the basis of unfair competition, but on the basis on an anti-trust violation. Therefore, to conclude that a statutory violation has occurred it must be shown that the price discrimination complained of will probably and substantially lessen competition.[6] In construing the Clayton Act, the Supreme Court has held various trade practices to amount to indirect price discriminations, as for example, the granting to favored customers of purchase options at existing prices in a rising market,[7] the granting of special quantity discounts,[8] and the granting to favored customers of additional time to take delivery of orders made on low price options.[9] In each case the probability of lessening competition was apparent. On the surface it is difficult to see how sales on consignment will have the effect of lessening competition, especially when so many businesses have a consignment sales policy. But when the practice is used to lure customers away from a smaller competitor who is unable for financial reasons to sell on consignment, the lessening of competition thereby becomes apparent. Such were the facts in the instant case. Consequently the holding appears to be a logical and justifiable addition to the list of recognized indirect price discriminations under § 2 of the Clayton Act as amended by the Robinson-Patman Act, § 1.

ROBERT A. ROMERO, JR.

Security Interests—Doctrine of Inconsistent Remedies Affecting Secured Party's Interest under the Uniform Commercial Code.—***In re Adrian Research & Chemical Co.***[1]—In consideration of an accumulation of rent arrearage due plaintiff, the defendant-lessee executed a promissory note containing a confession of judgment and also executed an agreement creating a security interest in certain items of the defendant's personal property. The plaintiff properly recorded the security agreement in conformity with the Uniform Commercial Code and also entered judgment on the note. By reason of a default in the payment of current rent, execution was issued on the judgment and a general levy was made on the personal property of the defendant. Subsequently the defendant filed a voluntary petition in bank-

[5] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-236 (1948); see Streiffer v. Seafarer's Sea Chest Corp., 162 F. Supp. 602, 607 (D.C.E.D. La. 1958).

[6] Lipson v. Socony-Vacuum Corp., 76 F.2d 213, 218 (1st Cir. 1935).

[7] Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 740 (1945).

[8] Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 42-44 (1948).

[9] Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U.S. 746, 750 (1945).

[1] 269 F.2d 735 (3d Cir. 1959).